FILED
OCT 7 1955
HAROLD B. WILLEY, Clerk

In The Supreme Court of The United States

OCTOBER TERM 1955

No. 452

ROSE MILLER, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF .CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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In The Supreme Court of The United States

OCTOBER TERM 1955

No. ——

ROSE MILLER, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Rose Miller, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on June 30, 1955.

Citation to Opinion Below

The opinion of the Circuit Court of Appeals, printed in Appendix B hereto, infra, p. 9, is reported in 224 F. 2d 561.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on June 30, 1955. R. 293; p. 13, *infra.* Rehearing

was denied on September 9, 1955. R. 339. The Jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

Questions Presented

I. Where an indictment for perjury in a single count alleges that defendant made perjurious statements with reference to four named individuals, and in the trial on said indictment the Court withdraws from consideration of the jury the testimony with reference to three of those individuals, and thereafter the jury finds defendant guilty with respect to her alleged perjurious statement with reference to the one remaining named individual; may the prosecution, in a second trial on the same indictment, granted on defendant's motion, again present testimony relating to the alleged perjury with reference to the same three without placing the defendant in double jeopardy.

II. Whether the petitioner can legally stand convicted of perjury for testimony given before a federal grand jury, when the prosecution failed to prove that such grand jury was legally constituted and was therefore a "competent tribunal", an essential element of the offense as defined by the statute.

Statute Involved

The statutory provision under which petitioner was prosecuted 18 U. S. C. Section 1621:

"Perjury generally

Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise

expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both."

Constitutional Provision

Amendment V:

"• • • nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; • • •"

Statement

Petitioner was indicted for perjury under 18 U. S. C. Section 1621. The indictment was in a single count containing a number of specifications charging false testimony before a grand jury regarding petitioner's relationship to several named persons. At the conclusion of the government's case, the petitioner moved for acquittal. The trial court denied the motion but stated that the jury would be instructed to disregard the evidence except as related to one of the persons who was one of the subjects of the alleged perjured testimony. In the Court's charge the jury was instructed not to consider evidence relating to the other three persons named in the indictment. Following a verdict of guilty and within the proper time, petitioner renewed her motion for judgment of acquittal, including in the alternative a motion for a new trial. The trial court entered an order granting a new trial and which order stated: "as required in the interest of justice upon the ground that the evidence produced at the trial was not sufficient to support a conviction of the offenses charged in the indictment."

A second trial was had, a motion for judgment of acquittal was made and denied, and a verdict of guilty was returned. In imposing sentence the Court stated: "That is a very light sentence for this offense. It is light because I feel that your testimony really had no particular bearing upon the matters under investigation. In other words, you did not testify or conceal anything that wasn't known, but, nevertheless, it was false testimony."

Reasons for Granting the Writ

The Circuit Court has decided an important question of constitutional law, which has not been, but should be settled by this Court. Also, the questions here presented involve important questions governing the administration of the criminal laws in the Federal Courts.

I

The indictment, in one count (App. p. 14), charged petitioner with perjury by having testified before a Grand Jury falsely that she never employed June Woods, Pat Cooper, Maxine Prescott, and Vickie Lee as prostitutes; that she never received money from these four; that these four never engaged in prostitution at petitioner's house in Miami, Florida; and that she knew nothing of the activities of these four.

In instructing the jury at the first trial on the indictment the Court instructed the jury to consider only the evidence as it related to June Woods and not the other three named in the indictment. (R. 25-126). The jury returned a verdict of guilty, and thereafter petitioner filed "Motion to Dismiss Indictment or in the Alternative for Other Appropriate Relief" (R. 20-24). This motion, among other grounds, urged that the instruction by the Court to the jury to ignore all testimony with respect to all but one of the named persons in the indictment was equivalent to an acquittal of petitioner of perjury with reference to the remaining three. The relief requested was for an order protecting her from jeopardy as to charges in the indictment relative to those three person (R. 23-24). This motion was denied, and thereafter the Court granted a new trial. At the second trial the prosecution not only presented evidence concerning the activities of June Woods; but most of the evidence concerned the activities of the other three.

It is respectfully submitted that the alleged false statements, even though given before the same judicial body

at the same time could each have been the subject of a separate count in the indictment. In that connection see *Seymour* v. *U.S.* (C. C. A. 8) 77 F. 2d 577:

> "Neither the circumstances that all (false answers) referred to the same general subject of inquiry or that all were made at the same hearing prevents each from being a separate and distinct crime punishable as such. The commission of perjury as to one matter does not absolve the witness or afford him immunity as to all other matters covered by his testimony at the same hearing. The obligation to testify truly and the penalty for false swearing is present as to every material answer given by him. While there is a sound discretion as to such matters in the trial court (citing cases), it would seem there would have been more ground for attacking the indictment as duplicitous had all of these matters been joined in one count than there is to attack the statement in separate counts."

Had the alleged false statements with respect to the three individuals been charged in separate counts, there is no question that under the court's charge to the jury the petitioner would necessarily have been acquitted on such counts, and at any attempted subsequent prosecution could avail herself successfully on a plea of double jeopardy.

In the case of *Hunter* v. *Wade* (C. C. A. 10) 169 F. 2d 973, Aff'd. sub nom. *Wade* v. *Hunter,* 336 U. S. 684, the Court held that it is the general rule that an accused is in jeopardy within the meaning of the constitutional guaranty against double jeopardy when he is put on trial in a court of competent jurisdiction upon an indictment or information sufficient in form and substance to sustain a conviction, and a jury has been impaneled and sworn.

In *Ex parte Nielson,* 131 U. S. 176, 188, this Court stated that the test of double jeopardy is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense.

And in *Ex parte Lange,* 18 Wall. 163, this Court stated

that the common law not only prohibited a second punishment for the same offense, but went further and forbade a second trial for the same offense, whether the accused had suffered punishment or not, and whether in the former trial he had been acquitted or convicted.

That prejudice resulted from the testimony respecting the activities of the remaining three prostitutes can hardly be doubted.

Under the Constitution petitioner had a right not to be twice jeopardized for offenses of which she had once been placed in jeopardy. And it may well be that conviction would have resulted on the charge involving June Woods even if the evidence had been limited to the activities concerning her only. But this is not the test.

That conviction would, or might probably, have resulted in a properly conducted trial is not the criterion. If it is highly probable that the error had substantial and injurious effect or influence in determining the jury's verdict, the conviction must be reversed. Cf. *Kotteakos* v. *United States,* 328 U. S. 750, 776.

II

The statute under which the prosecution against petitioner was brought makes it an offense to give false testimony before a "competent tribunal". The term "competent" is therefore made an essential element of the offense of perjury as defined in the statute.

The Federal Rules of Criminal Procedure, Rule 6, provides for the method of summoning grand juries, the number of members, of which it shall consist and function. And to be a duly constituted grand jury, or "competent" as defined by the statute, it must appear that the proper number of members was present at the time the alleged false testimony was given.

In *Christoffel* v. *United States,* 338 U. S. 84, this Court dealt with a situation involving a charge of perjury before a Congressional Committee. This Court held that the Committee, under the rules of the House, was competent to

exact testimony only when a quorum was present, and that, in the absence of such a quorum, it was not a "competent tribunal" as required by the perjury statute of the District of Columbia. The Court stated at p. 90:

> "Then to charge, however, that such requirement is satisfied by a finding that there was a majority present two or three hours before the defendant offered his testimony, in the face of evidence indicating the contrary, is to rule as a matter of law that a quorum need not be present when the offense is committed. This not only seems to us contrary to the rules and practice of the Congress but denies petitioner a fundamental right. *That right is that he be convicted of crime only on proof of all the elements of the crime charged against him. A tribunal that is not competent is no tribunal, and it is unthinkable that such a body can be the instrument of criminal conviction.*" (Emphasis added).

It would have been a simple matter to prove the number of grand jurors present at the time petitioner testified, as well as the authority for convening it. And yet the prosecution did not offer a scintilla of evidence relating to this. This element is just as essential, under the terms of the statute, as any other element of the offense, and the failure to prove this denied petitioner a fundamental right—that if she be convicted of crime, it be only on proof of *all* the elements of the crime charged against her.

While petitioner did not raise this question in the trial court, nor initially in the Court of Appeals, she did raise it in her petition for rehearing in the latter Court (R. 332).

Whether raised properly or not, the failure of proof of this element of the offense so affects the substantial rights of petitioner that it should be noticed by this Court.

Attention is called to Rule 52 (b) of the Federal Rules of Criminal Procedure, which states as follows:

> "Plain errors or defects affecting substantial rights may be noticed, although they were not brought to the attention of the Court."

The above rule is merely a restatement of the law that existed prior to the adoption of the Rules, and as held in a long line of decisions.

In cases where life or liberty is at stake, appellate courts will notice and correct a serious error plainly prejudicial to the rights of the defendant where no action has been taken. *Wiborg* v. *U. S.*, 163 U. S. 632, 658; *Clyatt* v. *U. S.*, 197 U. S. 207, 222; *Weems* v. *U. S.*, 217 U. S. 349, 362; *Brasfield* v. *U. S.*, 272 U. S. 448, 450; *Screws* v. *U. S.*, 325 U. S. 91, 107.

And where the error is so fundamental as to fail to submit the essential ingredients of the offense to the jury, the reviewing court will take note of it on its own motion. *Screws* v. *U. S., supra; Blodgett* v. *U. S.*, 161 F. (2d) 47, 52; *U. S.* v. *Capitol Meats*, 166 F. (2d) 537, 538.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

CHARLES E. FORD,
Counsel for Petitioner.

APPENDIX A

Opinion and Judgment Below

(R. 289-293)

IN THE UNITED STATES COURT OF APPEALS

For the Fifth Circuit

No. 15405

ROSE MILLER, *Appellant,*

versus

UNITED STATES OF AMERICA, *Appellee.*

Appeal from the United States District Court for the Southern District of Florida.

(June 30, 1955.)

Before HUTCHESON, Chief Judge, JONES, Circuit Judge, and WRIGHT, District Judge.

PER CURIAM: The appellant was indicted for perjury under 18 U.S.C.A. § 1621. The indictment was in a single count containing a number of specifications charging false testimony before a grand jury regarding appellant's relationship to several named persons. At the conclusion of the Government's case, the appellant made a motion for acquittal. The trial court denied the motion but said that the jury would be instructed to disregard the evidence except as related to one of the persons who were the subject of the alleged perjured testimony. In the Court's charge the jury was instructed not to consider evidence relating to the other persons named in the indictment. Following a verdict of guilty and within five days, the appellant's attorney renewed his motion for judgment of acquittal, including in the alternative a motion for a new trial. Rule 29, Federal Rules Criminal Procedure. The trial court entered an order granting a new trial under Rule 33, "as required in the interest of justice upon the ground that the evidence produced at the trial was not sufficient to support a conviction of the offenses charged in the indictment."

A second trial was had, a motion for judgment of acquittal was made and denied, and a verdict of guilty was returned. The appellant was sentenced to a year and a day. Apparently under the misapprehension that the law fixed a minimum term of a year and a day (Rec. 276), the district judge imposed that sentence upon her. In imposing the sentence, the court stated: "That is a very light sentence for this offense. It is light because I feel that your testimony really had no particular bearing upon the matters under investigation. In other words, you did not testify or conceal anything that wasn't known, but, nevertheless, it was false testimony".

Putting forward two grounds, appellant is here seeking reversal. The first and most relied on is the claim that the court having granted a new trial on the stated ground, "that the evidence produced at the trial was not sufficient to support a conviction of the offenses charged in the indict-

ment", the second trial on the same evidence put the defendant twice in jeopardy.

The second ground is that there is absent a showing that the testimony attributed to the defendant before the grand jury was material to any investigation which was then being conducted by it.

The short and complete answer to the first ground is that defendant having moved for and been granted a new trial, he must take the burden with the benefit and go back for a new trial on the whole case. *Valentin Trono* v. *U.S.*, 199 U.S. 292. Cf. what is said in *Ben Sapir* v. *U.S.*, 348 U.S. 373, in discussing the effect of a motion for a new trial:

> "If petitioner had asked for a new trial, different considerations would have come into play, for then the defendant opens the whole record for such disposition as might be just. See Bryan v. United States, 338 U.S. 552 (affirming Bryan v. U.S., C.C.A. 5, 175 F(2) 233), and see Trono v. U.S., 199 U.S. 521; Stroud v. U.S., 251 U.S. 15, 18; Francis v. Resweber, 329 U.S. 459, 462."

As to the second ground, a complete answer is that no such position was taken on the trial of the case below, either by motion to direct a verdict on the ground that the testimony was not material or by an exception to the charge which submitted to the jury whether there was false swearing and whether the thing or matter sworn to was material to the lawful inquiry being then made to the grand jury. If, however, we should consider the point as properly raised below and preserved here, appellant would stand no better, for it is clear that, within the meaning and intent of the statute and the decisions under it, the matter sworn to was material to the grand jury's inquiry. *Blackmon* v. *U.S.*, 5th Cir., 108 F(2) 572; *Sinclair* v. *U.S.*, 279 U.S. 263.

No error being made to appear, the judgment is AFFIRMED.

In view, however, of the judge's stated view, that the sentence he was imposing was the minimum allowed by

law, we think we should call to his attention that it is within his competence, if he desires to do so, at any time within sixty days after the sentence has become final, to resentence the defendant for such lesser term and under such terms as he may then deem right and proper. Rule 35 F.R.C.P., Title 18.

A True Copy:
Teste:

JOHN A. FEEHAN, JR.
Clerk of the United States Court of
Appeals for the Fifth Circuit.

JUDGMENT

Extract from the Minutes of June 30, 1955.

No. 15405.

ROSE MILLER,

versus

UNITED STATES OF AMERICA

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

APPENDIX B

Indictment

(R. 1-4)

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION.

No. 8932-M-Cr.

(18 USC 1621)

UNITED STATES OF AMERICA,

versus

ROSE MILLER.

On April 15, 1954 INDICTMENT was filed in open Court in the words and figures as follows:

The Grand Jurors of the United States of America, duly impaneled and sworn to inquire within and for the body of the Southern District of Florida, and now attending the said Court, upon their oaths present:

That on or about September 17, 1954, the aforesaid Grand Jury commenced an inquiry into the activities of several alleged violators of Title 18, U. S. Code, Section 2421 prohibiting the interstate transportation of females for the purpose of prostitution; and further commenced inquiry into the activities of several of the purporter victims thus transported in interstate commerce; that except for intermittent recesses the said Grand Jury Investigation has been continuous from February 17, 1954, until the date of this indictment. The purpose of the inquiry was to discover if the suspected individuals had in fact transported certain females from without the State of Florida into the State of Florida for the purpose of prostitution and other immoral purposes;

That pursuant to the aforesaid inquiry it was material for the Grand Jurors to know if any of the victims thus alleged to have been transported into the State of Florida for the purposes aforesaid had at any time been employed in the City of Miami as prostitutes in established houses of prostitution; and it was further material to know whether or not the alleged victims in fact engaged in prostitution at Miami, Florida;

And the Grand Jurors aforesaid, upon their oaths would further present that on or about February 17, 1954, at Miami, in the Southern District of Florida and within the jurisdiction of this Court, Rose Miller, the defendant herein, became then and there a witness before the said Grand Jury and, having first been duly sworn by the foreman thereof to tell the truth, being then and there under oath did willfully, knowingly, unlawfully, corruptly and contrary to her oath, in response to questions then and

there propounded to her, depose and testify to material matters which she did not believe to be true and which she then and there knew to be false, which said testimony was in substance as follows:

1. That she had never employed June Woods, also known as June Marilyn Sagalov; Pat Cooper; Maxine Prescott, also known as Candy; and Vicki Lee, also known as Toy, also known as Dolores Vasquez, also known as Dolores Newman, as prostitutes;

2. That she never received money from June Woods, also known as June Marilyn Sagalov; Pat Cooper; Maxine Prescott, also known as Candy; and Vicki Lee, also known as Toy, also known as Dolores Vasquez, also known as Dolores Newman, except $10.00 per week as room rent;

3. That June Woods, also known as June Marilyn Sagalov; Pat Cooper; Maxine Prescott, also known as Candy; and Vicki Lee, also known as Toy, also known as Dolores Vasquez, also known as Dolores Newman, never engaged in prostitution while staying at her house at 3120 N. W. 41st Street, Miami, Florida;

4. That she knew nothing of the activities of June Woods, also known as June Marilyn Sagalov; Pat Cooper; Maxine Prescott, also known as Candy; and Vicki Lee, also known as Toy, also known as Dolores Vasquez, also known as Dolores Newman, while they stayed at her house;

That the said defendant at the time she deposed and testified as aforesaid, did not believe her said testimony to be true, and then and there knew the same to be false, and then and there well knew that during the Fall and Winter of 1953, and some time prior to February 17, 1954.

1. She had employed the aforesaid June Woods, also known as June Marilyn Sagalov; Pat Cooper; Maxine Prescott, also known as Candy; and Vicki Lee, also known as Toy, also known as Dolores Vasquez, also known as Dolores Newman, as prostitutes at her dwelling at 3120 N. W. 41st Street, Miami, Florida;

2. She had accepted money from the aforesaid June Woods, also known as June Marilyn Sagalov; Pat Cooper; Maxine Prescott, also known as Candy; and Vicki Lee, also known as Toy, also known as Dolores Vasquez, also known as Dolores Newman, representing fifty per cent of their earnings as prostitutes while employed by her;

3. She knew the aforesaid June Woods, also known as June Marilyn Sagalov; Pat Cooper; Maxine Prescott, also known as Candy; and Vicki Lee, also known as Toy, also known as Dolores Vasquez, also known as Dolores Newman, were engaged in prostitution while staying at her dwelling at 3120 N. W. 41st Street, Miami, Florida;

4. She knew the aforesaid June Woods, also known as June Marilyn Sagalov; Pat Cooper; Maxine Prescott, also known as Candy; and Vicki Lee, also known as Toy, also known as Dolores Vasquez, also known as Dolores Newman, were staying at her house located at 3120 N. W. 41st Street, Miami, Florida, for the sole purpose of prostituting themselves; and that she well knew the aforesaid June Woods, also known as June Marilyn Sagalov; Pat Cooper; Maxine Prescott, also known as Candy; and Vicki Lee, also known as Toy, also known as Dolores Vasquez, also known as Dolores Newman, were thus engaged while staying at her house;

in violation of Title 18, U. S. Code Section 1621.

A True Bill

SAMUEL S. BLOCK,
Foreman.

J. EDWARD WORTON,
Assistant U. S. Attorney.

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 452

ROSE MILLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 289-292; Pet. 9-12) is reported at 224 F. 2d 561.

JURISDICTION

The judgment of the Court of Appeals (R. 293; Pet. 12) was entered on June 30, 1955, and a petition for rehearing was denied on September 9, 1955 (R. 339). The petition for a writ of certiorari was filed on October 7, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Petitioner was charged with perjury in a one-count indictment alleging false testimony with respect to four girls. At the first trial, the court instructed the jury to consider only the evidence relating to one girl, ruling that the evidence as to the others was not sufficiently clear. Following a guilty verdict the trial court granted petitioner a new trial, at which the government introduced evidence of petitioner's relationship with all four girls. The first question is whether the introduction of such evidence placed petitioner in double jeopardy.

2. Whether the government failed to prove that the grand jury was a "competent tribunal", with respect to the number of grand jurors present and also the authority for convening the grand jury.

STATUTE AND RULES INVOLVED

18 U.S.C. 1621 provides:

§ 1621. Perjury generally.

Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly pro-

vided by law, be fined not more than $2,000 or imprisoned not more than five years, or both.

Rule 29, F. R. Crim. P., provides:

Rule 29. Motion for Acquittal.

(a) *Motion for Judgment of Acquittal.* Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.

(b) *Reservation of Decision on Motion.* If a motion for judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the motion is denied and the case is submitted to the jury, the motion may be renewed within 5 days after the jury is discharged and may include in the alternative a motion for a new trial. If

a verdict of guilty is returned the court may on such motion set aside the verdict and order a new trial or enter judgment of acquittal. If no verdict is returned the court may order a new trial or enter judgment of acquittal.

Rule 33, F. R. Crim. P., provides:

Rule 33. New Trial.

The court may grant a new trial to a defendant if required in the interest of justice. If trial was by the court without a jury the court may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 5 days after verdict or finding of guilty or within such further time as the court may fix during the 5-day period.

STATEMENT

In the United States District Court for the Southern District of Florida, petitioner was indicted for perjury, 18 U.S.C. 1621, allegedly committed during testimony before that court's grand jury which was investigating interstate transportation of women for purposes of prostitution (18 U.S.C. 2421).

The indictment (R. 1-4; Pet. 13-16) alleged in pertinent part that petitioner, having been duly sworn, falsely testified that (1) she had never employed June Woods, Pat Cooper, Maxine Prescott, and Vicki Lee, as prostitutes; (2) that she had never received money from these four persons except ten dollars per week as room rent; (3) that the four never engaged in prostitution while staying at her house in Miami; (4) that she knew nothing of their activities while staying at her house.

At the conclusion of the government's case, petitioner moved for an acquittal. In denying the motion, the court stated that the jury would be instructed (and he did so charge them) to consider only those parts of the evidence on the four assignments which related to June Woods, disregarding those parts of the evidence which related to the other three who were, as shown above, included with June Woods in each of the four assignments. (R. 120-121, 125-127.) Petitioner was found guilty. She then moved for judgment of acquittal, or in the alternative for a new trial. (R. 11.) The court ordered a new trial "as required in the interest of justice, upon the ground that the evidence produced at the trial was not sufficient to support a conviction * * *" (R. 20). Between trials petitioner moved to dismiss the indictment on the ground that the court's order in granting the new trial had ruled that the evidence produced could not support a conviction (R. 20-24). The trial court denied the motion (R. 26).

At the second trial the court admitted evidence

with respect to petitioner's allegedly perjured testimony regarding her relationship with all four individuals named in the indictment.[1] Following a second verdict of guilty petitioner again moved for an acquittal or a new trial (R. 27) and the trial court denied the motion (R. 32). Petitioner was sentenced to serve a year and a day (R. 273, 33-34).[2] The Court of Appeals affirmed, *per curiam* (R. 289; Pet. 12).

ARGUMENT

1. Petitioner contends that because, on the first trial, the court instructed the jury to disregard all evidence with respect to petitioner's relationship with the individuals mentioned in the indictment, other than June Woods, the introduction of evidence with respect to these persons on the second trial constituted double jeopardy.[3] This is not,

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[1] On her motion to dismiss the indictment following the first trial petitioner contended that the indictment should have been "amended" to exclude all evidence relating to girls other than June Woods (R. 22) but she did not object to testimony, at the second trial, pertaining to all the girls.

[2] The opinion of the Court of Appeals noted that the trial court was evidently under the impression that this was the minimum sentence, and called his attention to the fact that he had the power, at any time within sixty days after the sentence had become final, to resentence petitioner for such lesser term as he deemed proper (Rule 35, F. R. Crim. P).

[3] Petitioner does not here claim double jeopardy with respect to the reintroduction of evidence concerning June Woods on which evidence she had been once convicted, though her motion below urged this point (R. 23). Clearly, her motion for a new trial waived the double jeopardy, *United States* v. *Ball*, 163 U.S. 662, even though she had moved for an acquittal on this conviction.

however, a case of acquittal of some counts of a multi-count indictment where the acquittal would bar a second trial. Cf. *United States* v. *Ball*, 163 U.S. 662. The indictment here contained one count of perjury charging four different false statements, each of which was allegedly made with respect to petitioner's relationship with several girls. Thus there was one charge,[4] for which only one punishment could be imposed. When the conviction on that one charge was set aside, the whole case was reopened anew, as at the commencement of the case. As this Court said in *Trono* v. *United States*, 199 U.S. 521, 534, "When at his own request he has obtained a new trial, he must take the burden with the benefit, and go back for a new trial of the whole case. It does not appear to us to be a practice founded on solid reason to permit such a limited waiver of an accused party, while himself asking for a reversal of the judgment". If, as in *Trono*, an acquittal of a higher degree of homicide does not bar re-trial of the higher degree on a defendant's request for a new trial, *a fortiori*, mere withdrawal from the jury of certain evidence or of parts of certain assignments in a one-count perjury indictment, on the ground of insufficient evidence, will not prevent the submission of such evidence to the jury where a defendant's request for a new trial is granted.

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[4] A single count covering one appearance before a tribunal may properly contain several assignments of perjury. *United States* v. *Otto*, 54 F. 2d 277 (C.A. 2); *Shallas* v. *United States*, 37 F. 2d 692 (C.A. 9).

This Court has affirmed the propriety of permitting a new trial on defendant's request where "defects in the evidence might be supplied", even where the defendant should have been acquitted in the first instance by the trial court. *Bryan* v. *United States*, 338 U.S. 552. Cf. *Sapir* v. *United States*, 348 U.S. 373; *Shurman* v. *United States*, 219 F. 2d 282 (C.A. 5), certiorari denied, 349 U.S. 921.

2. For the first time, in her petition for rehearing in the Court of Appeals, petitioner raised the contention (see Pet. 6, 7) that the government failed to prove that the grand jury was a "competent tribunal", in that it did not show the authority for convening it and the number of grand jurors present. The stenographer, through whom the record of petitioner's testimony was introduced, did, however, testify that the transcript was of the testimony of petitioner taken before the Grand Jury of the United States District Court, Southern District of Florida, Miami Division, at the April, 1953 term (R. 142), and an Assistant United States attorney and the grand jury foreman testified that on the significant date the grand jury was in session (R. 150, 183). In view of the presumption of regularity which attaches to a grand jury as an arm of the court (cf. *United States* v. *Johnson*, 319 U.S. 503, 512-513), this testimony, in the absence of any attack by petitioner, was sufficient evidence to show that the testimony was given before a competent tribunal.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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NOVEMBER, 1955.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1955 926931 675